Supreme Court, U.S.
FILED
MAR 8 1993
OFFICE OF THE CLERK

No. 92-960

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS D. MCAUSLAND AND CHRISTOPHER M. PAFORT,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Kate Martin
American Civil Liberties
Union Foundation
122 Maryland Ave., N.E.
Washington, D.C. 20002
(202) 675-2327

Steven R. Shapiro
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Mark H. Lynch*
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Sheryl Walter
National Security Archive
1755 Mass. Avenue, N.W.
Washington, D.C. 20036
(202) 797-0882

Attorneys for Amici Curiae
** Counsel of Record*

March 1993

ISSUE PRESENTED

Under the First Amendment, may the government prosecute private citizens for acquiring and using unclassified government information, in the absence of a statute that clearly applies to such information?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 2

REASONS FOR GRANTING THE WRIT 4

I. THE JUDGMENT BELOW RAISES AN IMPORTANT FIRST AMENDMENT ISSUE 6

II. ONLY CONGRESS CAN DECIDE WHETHER CRIMINAL PENALTIES ATTACH TO THE ACQUISITION AND USE OF GOVERNMENT INFORMATION, AND NEITHER SECTION 641 NOR SECTION 1343 WAS INTENDED TO HAVE THAT REACH 10

CONCLUSION 15

TABLE OF AUTHORITIES

Cases	*Page*
Ashton v. Kentucky, 384 U.S. 195 (1966)	11
Butterworth v. Smith, 494 U.S. 624 (1990)	7
Carpenter v. United States, 484 U.S. 19 (1987)	12
Department of the Air Force v. Rose, 425 U.S. 352 (1976)	10
Dowling v. United States, 473 U.S. 207 (1985)	10
Garner v. Louisiana, 368 U.S. 157 (1961)	11, 12
Grayned v. City of Rockford, 408 U.S. 104 (1972)	9
Grosjean v. American Press Co., 297 U.S. 233 (1936)	6
Kent v. Dulles, 357 U.S. 116 (1958)	11
Kolender v. Lawson, 461 U.S. 352 (1983)	8

Cases (continued) ***Page***

Leathers v. Medlock,
111 S. Ct. 1438 (1991) 6

McNally v. United States,
483 U.S. 350 (1987) 10, 12

Mills v. Alabama,
384 U.S. 214 (1966) 6

NAACP v. Button,
371 U.S. 415 (1963) 9

Patterson v. Colorado,
205 U.S. 454 (1907) 8

Pell v. Procunier,
417 U.S. 817 (1974) 6

United States v. Computer Sciences Corp.,
689 F.2d 1181 (4th Cir. 1982),
cert. denied, 459 U.S. 1105 (1983) 11

United States v. Morison,
844 F.2d 1057 (4th Cir.),
cert. denied, 488 U.S. 908 (1988) 6, 7

United States v. Truong Dinh Hung,
629 F.2d 908 (4th Cir. 1980),
cert. denied, 454 U.S. 1144 (1982) 11

Vance v. Universal Amusement Co.,
445 U.S. 308 (1980) 9

Statutes **Page**

5 U.S.C. § 552 (1988) 10

17 U.S.C. § 105 (1988) 10

18 U.S.C. § 641 (1988) 4, 11

18 U.S.C. § 1341 (1988) 11

18 U.S.C. § 1343 (1988) 4

18 U.S.C. § 1902 (1988) 13

18 U.S.C. § 1905 (1988) 13

18 U.S.C. §§ 1906-1908 (1988) 13

18 U.S.C. § 2511(1)(c) (1988) 13

26 U.S.C. § 7213 (1988) 13

41 U.S.C. § 423(a) (1988) 13

50 U.S.C.A. App. §§ 5, 16 (1988) 10

Pub. L. No. 97-200, 96 Stat. 122,
50 U.S.C. § 421 (1988) 13, 14

Legislative

H.R. Rep. No. 580, 97th Cong., 2d Sess. (1982) 14

Miscellaneous

Writings of James Madison 103 (G. Hunt ed. 1910) 6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No. 92-960

THOMAS D. MCAUSLAND
AND CHRISTOPHER M. PAFORT,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Amici curiae, the American Civil Liberties Union, the American Society of Newspaper Editors, the Federation of American Scientists, the National Newspaper Association, the National Security Archive, the Newsletter Publishers Association, Inc., the Newspaper Guild, the Radio-Television News Directors Association, and the Reporters Committee for Freedom of the Press, submit this brief in support of the petition for certiorari. As set forth more fully below, this case is of exceptional importance because the

decision of the court of appeals (1) imperils the ability of the press and the public to acquire and use government information, and (2) represents an unwarranted expansion of criminal statutes by the executive and judicial branches into an area of First Amendment sensitivity that Congress never intended to reach.

INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 275,000 members, dedicated to the protection of civil rights and civil liberties. The ACLU has a long history of promoting individual rights, including rights associated with the First Amendment. In particular, the ACLU has tried to ensure that the United States government, whatever party may be in power, remains open to the people and that government information, except in the most limited circumstances, remains available to inform public debate.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States.

The Federation of American Scientists is a national organization of scientists and engineers concerned with issues of science and national security policy. The Federation's research and advocacy function is predicated on the acquisition, analysis and dissemination of government information.

The National Newspaper Association (NNA) is a national trade association representing the interests of weekly and daily newspapers throughout the country. Founded in 1885 and with almost 5,000 members, NNA is the oldest and largest national trade association in the newspaper industry. For more than a century, a major concern of NNA has been to ensure that political and commercial information be distributed in an open and robust manner.

The National Security Archive is a non-profit, non-partisan foreign policy research institute and library that collects and publishes declassified and unclassified government documents. The Archive is dedicated to promoting freedom of information through broad public access to and dissemination of government records so that the information in such documents is widely available for the effective exercise of individuals' First Amendment rights through informed public debate and so that such information is preserved as a contemporaneous account of our nation's history for the future.

The Newsletter Publishers Association, Inc. represents 700 publishers of approximately 2,200 newsletters and specialized information services. Many of these newsletters report on the activities of government agencies and actively gather information about those agencies.

The Newspaper Guild, a labor organization representing 40,000 employees of newspapers, magazines, and related enterprises in the United States and Canada, has long been active in protecting the First Amendment rights of journalists and others.

The Radio-Television News Directors Association is the principal professional organization of journalists – executives, editors, reporters and others – who gather and disseminate news and other information on radio and television in the United States.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors dedicated to defending the First Amendment and freedom-of-information interests of the news media and public. The Reporters Committee has provided representation, legal guidance and research in virtually every major freedom of the press case litigated since 1970.

REASONS FOR GRANTING THE WRIT

Petitioners were convicted under the theft of government property statute, 18 U.S.C. § 641 (1988), the wire fraud statute, 18 U.S.C. § 1343 (1988), and related conspiracy counts, for obtaining unclassified information concerning certain Department of Defense procurements in which their employer had an interest. Although petitioners had no intention of sharing this information with the public, procurement information can be of genuine news interest, particularly to the specialized trade press, and is the sort of information that some of the amici regularly seek out and publish.

The court below held that sections 641 and 1343 are applicable here because Federal Acquisition Regulations (FAR's), unpublished directives and internal government policies and practices put petitioners on notice that they were without authority to acquire or use the information

at issue. This theory of liability is inconsistent both with the First Amendment and the doctrine of separation of powers. To define the reach of sections 641 and 1343 by reference to departmental regulations and internal practices renders them unconstitutionally vague and overbroad. Furthermore, these statutes do not on their face apply to government information, and they certainly do not reflect a considered congressional judgment that control of government information should be enforced with criminal sanctions. The decision below therefore represents an unwarranted judicial usurpation of the legislative process, a development that is particularly dangerous in the constitutionally sensitive area of government information.

As a practical matter, the judgment below puts the press and other members of the public who seek out and use government information in an impossible position when deciding what information they may lawfully acquire and use, because those decisions must turn on a body of informal directives, policies and practices that can be ascertained only with great difficulty, if at all. Furthermore, the informality of the standards used to define criminal liability vests unprecedented discretion in the hands of government officials. The theory of liability sustained in this case does not merely chill First Amendment rights, it paralyzes reporters, editors, researchers, academics and plain citizens who seek to learn and communicate about government activity.

I. THE JUDGMENT BELOW RAISES AN IMPORTANT FIRST AMENDMENT ISSUE

This Court has stated that "there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). Such discussion would be hollow and ill-informed without the public's ability to acquire government information. As James Madison wrote: "A popular Government, without popular information, or a means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both." 9 *Writings of James Madison* 103 (G. Hunt ed. 1910). Indeed, the First Amendment rests on the presumption that "informed public opinion is the most potent of all restraints upon misgovernment." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

As the Court has recognized, "[t]he press plays a unique role as a check on government abuse." *Leathers v. Medlock*, 111 S. Ct. 1438, 1443 (1991). Although the press often acts as a surrogate for the public in acquiring government information, *see United States v. Morison*, 844 F.2d 1057, 1081 (4th Cir.) (Wilkinson, J. concurring), *cert. denied*, 488 U.S. 908 (1988), members of the public are no less the beneficiaries of the First Amendment protections than the press and are no less entitled to invoke these protections. *See Pell v. Procunier*, 417 U.S. 817, 833-34 (1974).

As construed by the court below, sections 641 and 1343 clearly "threaten to hinder the press [or any other citizen] as a watchdog of government activity." *Leathers*, 111 S. Ct. at 1444. As Judge Wilkinson has observed, "[t]here exists the tendency, even in a constitutional democracy, for government to withhold reports of disquieting developments

and to manage news in a fashion most favorable to itself." *Morison*, 844 F.2d at 1081 (concurring opinion). Applying sections 641 and 1343 to government information on the basis of administrative regulations, directives or practices places criminal sanctions behind that dangerous tendency.

The court of appeals' construction of sections 641 and 1343 arguably will criminalize the premature release of an innocuous public statement by a public official, the publication of the internal deliberations of a government body, and even the exposure of government corruption – as long as the responsible government official (perhaps the corrupt official) has not given permission for the disclosure. Not only the disclosure of such information by government officials, but also its receipt by the press or other members of the public, would be a crime. Yet "the publication of information relating to alleged government misconduct [is] speech which has traditionally been recognized as lying at the core of the First Amendment." *Butterworth v. Smith*, 494 U.S. 624, 632 (1990).

The press and other researchers have an important role in informing the public about the operations of government. Oftentimes, reporters and others obtain and publish information that high government officials have tried to keep secret. In the case of government misconduct or corruption, for example, the relevant government information will not often be provided by those "authorized" to disclose it. Yet, under the court of appeals' interpretation of sections 641 and 1343, a reporter who acquired and used such information, as well as the newspaper that published it, might be subject to prosecution. On the court of appeals' interpretation, the government would be able to prosecute not only government officials and defense

contractors, but also any citizen who studies and reports on the operations of government, whenever they acquire and use information that certain government officials direct their subordinates to conceal, for whatever reason, from the public.

Under the decision below, the only sure way for a reporter or other citizen to be confident that use of government information acquired other than through official channels is not proscribed by internal directives, policies or practices is to ask government officials in advance of publication. This procedure is impractical because it gives to those who are the subject of scrutiny a veto over what information may be used. It is also antithetical to the First Amendment because coercing the press and public, with the threat of criminal prosecution, to seek prior approval for publication is a form of prior restraint. Yet "the main purpose" of the First Amendment was "to prevent all such *previous* restraints upon publications as had been practiced by other governments." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (emphasis in original).

As construed by the court of appeals, sections 641 and 1343 are both unconstitutionally vague and overbroad. To avoid the vice of vagueness, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In the First Amendment context, a statute that turns on departmental regulations and practices cannot meet these requirements. For private citizens, distinguishing between government information that is lawful to acquire and use and information that is criminally

proscribed must not be made to depend on a comprehensive knowledge of the Code of Federal Regulations and daily review of the Federal Register. The decision below, however, holds that unpublished agency directives and even agency practices are sufficient to define the reach of criminal statutes.

A statute is overbroad when it proscribes the disclosure or acquisition of information that is harmless and protected by the First Amendment as well as information that might lawfully be regulated because of a compelling interest in secrecy. *See Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). Contract procurement information is the present focus of government attention, but the government has not suggested that the information defendants acquired represents any limiting principle on the applications of sections 641 and 1343. This Court has repeatedly warned of "the . . . 'danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.'" *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315 n.12 (1980) (per curiam) (*quoting NAACP v. Button*, 371 U.S. 415, 433 (1963)). By extending sections 641 and 1343 to encompass a vast array of government information, the executive branch would achieve just such a result.

II. ONLY CONGRESS CAN DECIDE WHETHER CRIMINAL PENALTIES ATTACH TO THE ACQUISITION AND USE OF GOVERNMENT INFORMATION, AND NEITHER SECTION 641 NOR SECTION 1343 WAS INTENDED TO HAVE THAT REACH

Government information is presumptively public information. That judgment is reflected in the Copyright Act, 17 U.S.C. § 105 (1988), which denies the government the protections of copyright, and in the Freedom of Information Act, 5 U.S.C. § 552 (1988), which requires public disclosure of all agency records, subject to nine specific exemptions. *See Department of the Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). The presumption, of course, can be overcome, but only Congress has the authority to make the essentially legislative decision as to what categories of government information will be the subject of criminal penalties.[1]

It is a fundamental principle of due process, separation of powers and the canons of statutory construction that courts will not extend any criminal statute to conduct when it is uncertain whether the legislature intended to reach that conduct. *See McNally v. United States*, 483 U.S. 350, 359-60 (1987); *Dowling v. United States*, 473 U.S. 207, 213-14 (1985). When, as here, the statute affects interests protected by the First Amendment, this rule has special force and the legislative intent must be especially clear.

---

[1] Congress did not delegate such decisions to the President under sections 641 and 1343 as it has in other statutes. *See, e.g.*, Trading With the Enemy Act, 50 U.S.C.A. App. §§ 5, 16 (1988).

See Ashton v. Kentucky, 384 U.S. 195, 200-01 (1966); *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958).

Justice Harlan explained this point well when he wrote that government cannot criminalize conduct that is within the range of First Amendment protection by means of a "general and all-inclusive ... prohibition." *Garner v. Louisiana*, 368 U.S. 157, 202 (1961) (concurring opinion). Instead, the legislature must enact a statute that is "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." *Id.* (*quoting Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940)). This limitation is justified

> "not because control of such activity is beyond the power of the State, but because sound constitutional principles demand of the ... legislature that it focus on the nature of the otherwise 'protected' conduct it is prohibiting, and that it then make a legislative judgment as to whether that conduct presents so clear and present a danger to the welfare of the community that it may legitimately be criminally proscribed." *Id.* at 203 (footnote omitted).

Congress clearly did not make any such considered judgment when it enacted sections 641 and 1343. "[T]he legislative history reveals that Congress has never directly considered the application of § 641 to government information." *United States v. Truong Dinh Hung*, 629 F.2d 908, 923 (4th Cir. 1980) (separate opinion of Winter, J.), *cert. denied*, 454 U.S. 1144 (1982). The same is also true of section 1343. The wire fraud statute is based on its older sibling, the mail fraud statute, 18 U.S.C. § 1341 (1988). *See*

United States v. Computer Sciences Corp., 689 F.2d 1181, 1188 n.14 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983). That statute, which – like section 641 – was first enacted in the 19th century, "had its origin in the desire to protect individual property rights" and not government information. *McNally*, 483 U.S. at 359 n.8.

Both section 641 and section 1343 are "general and all-inclusive" statutes and neither reflects a specific congressional judgment that receipt of government information, as opposed to tangible government property, "presents so clear and present a danger to the welfare of the community that it may legitimately be criminally proscribed." *Garner*, 368 U.S. at 203. For the reasons stated by Justice Harlan in that case, these statutes should not be expanded to an area where First Amendment interests are at stake.[2]

The executive branch should not be permitted to expand the reach of general statutes such as sections 641 and 1343 to government information by mere reference to its own regulations and internal practices. To allow the executive branch to determine in its discretion what information falls within or without these broad statutes usurps the role of Congress in making the delicate legislative decisions as to what sorts of government information will be the subject of criminal penalties.

---

[2] This Court has held that the mail and wire fraud statutes apply to the conversion of proprietary information belonging to a private employer. *Carpenter v. United States*, 484 U.S. 19 (1987). That case is plainly distinguishable because here government information is at issue. None of the First Amendment interests implicated here were implicated in *Carpenter*.

Permitting the government to use sections 641 and 1343 to prosecute the acquisition of government information also upsets the precise and complex framework that Congress has constructed with regard to criminal penalties for such conduct. Congress has approached this issue with great caution. Putting aside the statutes dealing with information that is classified for reasons of national security (which is not involved here), Congress has criminalized the disclosure by government officials of only certain limited categories of government information and in most instances has not extended these statutes to the recipients of the information. *See* 18 U.S.C. § 1902 (1988) (crop reports); 18 U.S.C. § 1905 (1988) (trade secrets); 18 U.S.C. §§ 1906-1908 (1988) (bank examination information). Statutes criminalizing the use of government information by citizens not employed by the government are rare and are quite specific in the information to which they apply. *See* 18 U.S.C. § 2511(1)(c) (1988) (information obtained through electronic surveillance); 26 U.S.C. § 7213 (1988) (tax returns). In this case, the Court is confronted with the remarkable fact that Congress made the unauthorized use of procurement information a crime only *after* appellants engaged in the conduct for which they were convicted. 41 U.S.C. § 423(a) (1988).[3]

The care and delicacy with which Congress approaches the question of criminalizing the use of government information by those outside the government is best illustrated by the Intelligence Identities Protection Act of 1982, Pub. L. No. 97-200, 96 Stat. 122, 50 U.S.C. § 421 (1988). In that statute, Congress was dealing with one of the most sensitive categories of information our government maintains – the

---

[3] Amici take no position on whether that statute is constitutional.

identities of its covert intelligence agents whose very lives can depend on preserving their secrecy. With respect to individuals who learn the identities of intelligence agents through authorized access to classified information, the statute imposes criminal liability for the intentional and knowing disclosure of such identities. 50 U.S.C. § 421(a) and (b) (1988). However, with respect to individuals outside the government without authorized access to classified information, the statute applies only to those who disclose the identity of an agent "in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States." 50 U.S.C. § 421(c) (1988).

This standard was adopted so that the statute would apply to those outside the government "only in very limited circumstances to deter those who make it their business to ferret out and publish the identities of agents." H.R. Rep. No. 580, 97th Cong., 2d Sess. 8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 172. Congress did not, however, want the statute to "affect the First Amendment rights of those who disclose the identities of agents as an integral part of another enterprise such as news media reporting of intelligence failures or abuses, academic studies of U.S. government policies and programs, or a private organization's enforcement of its internal rules." *Id.*

The Intelligence Identities Protection Act demonstrates that even with respect to the most sensitive types of government information, as to which the strongest arguments for criminal penalties can be made, such penalties attach only in the most limited of circumstances. These complex balancing decisions must be left to Congress rather than

permitting the executive branch to decide what government information is proscribed through its ever-expanding use of broad statutes such as sections 641 and 1343.

CONCLUSION

For the reasons set forth above, the petition should be granted.

Respectfully submitted,

Kate Martin
American Civil Liberties
Union Foundation
122 Maryland Ave., N.E.
Washington, D.C. 20002
(202) 675-2327

Steven R. Shapiro
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Mark H. Lynch*
Covington & Burling
1201 Pennsylvania Ave., N.W.
Post Office Box 7566
Washington, D.C. 20044
(202) 662-6000

Sheryl Walter
National Security Archive
1755 Mass. Avenue, N.W.
Washington, D.C. 20036
(202) 797-0882

Attorneys for Amici Curiae
** Counsel of Record*

March 1993